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Nos. 90-1145, 90-6448, 90-6834 and 90-7084

In the Supreme Court of the United States

OCTOBER TERM, 1990

NICODEMO SCARFO, NICHOLAS VIRGILIO, JOSEPH CIANCAGLINI, AND PHILLIP NARDUCCI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the RICO counts against petitioners Scarfo and Ciancaglini were barred by the Double Jeopardy Clause because of their previous RICO convictions.

2. Whether the RICO counts against petitioners Frank and Phillip Narducci impermissibly charged predicate offenses consisting of conspiracy to murder and attempt to murder.

3. Whether the RICO counts against Frank and Phillip Narducci were duplicitous in that they charged conspiracy to commit murder, attempted murder, and murder as alternative theories within individual predicate acts.

4. Whether the district court's instruction on co-conspirator liability permitted the jury to convict on the RICO conspiracy charge without finding that the individual defendants had the requisite intent regarding the underlying predicate acts.

5. Whether petitioner Ciancaglini's convictions should be reversed because the prosecution improperly vouched for the credibility of key government witnesses.

6. Whether the evidence was sufficient to support petitioner Virgilio's RICO convictions.

7. Whether the district court erred in sentencing petitioners Scarfo, Frank Narducci, and Phillip Narducci to consecutive sentences for RICO conspiracy and the underlying substantive RICO offense.

8. Whether the district court erred in ordering the sentences of Frank and Phillip Narducci to run consecutively to their life sentences on state charges.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A142)[1] is reported at 910 F.2d 1084. The opinion of the district court is reported at 711 F. Supp. 1315.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1990. Petitions for rehearing were denied on September 10, 1990. Pet. App. B1-B4. The petition for a writ of certiorari in No. 90-6448 was filed on December 7, 1990, and the petitions in No. 90-1145 and No. 90-6834 were filed on December 10, 1990, a Monday. On December 7, 1990, and January 28, 1991, Justice Souter extended the time for filing the petition in No. 90-7084 to February 8, 1991, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, each petitioner was convicted of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), and conspiring to commit that offense, in violation of 18 U.S.C. 1962(d). Petitioner Scarfo was also convicted on one count of conducting an illegal gambling business, in violation of 18 U.S.C. 1955, and on two counts of possessing methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).

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[1] "Pet. App." refers to the petition appendix in No. 90-1145.

Petitioner Ciancaglini was convicted on one count of possessing methamphetamine with intent to distribute it. Scarfo was sentenced to 55 years' imprisonment and a fine of $50,000; Ciancaglini was sentenced to 45 years' imprisonment; Virgilio was sentenced to 40 years' imprisonment; Phillip Narducci was sentenced to 40 years' imprisonment, to be served consecutively to a previous state sentence; and Frank Narducci was sentenced to 35 years' imprisonment, to be served consecutively to a previous state sentence. The court of appeals affirmed. Pet. App. A1-A142.

1. The evidence at trial is described in the opinion of the court of appeals. Pet. App. A9-A21. Briefly, it showed that petitioner Scarfo was the head of, and each other petitioner was a member of, the 60-member Philadelphia Mafia, which conducted criminal operations in eastern Pennsylvania and much of New Jersey. *Id.* at A10. To become a member of the Scarfo family, an aspiring associate had to be a male of Italian descent who had participated in at least one murder pursuant to Scarfo's order. *Id.* at A11. Prior to 1982, petitioner Ciancaglini was a "capo" in the organization, with the responsibility of controlling a "crew" or "regime" of "soldiers," whose ranks included petitioner Frank Narducci. In 1982, petitioner Virgilio became a soldier and, in 1986, petitioner Phillip Narducci joined him in that status. *Id.* at A12.

From April 1976 to October 1987, the Scarfo family's criminal activities included nine murders, four attempted murders, drug trafficking, the conduct of illegal gambling businesses, the extortionate collection of "street taxes" from non-family drug dealers and operators of illegal gambling businesses, the col-

lection of unlawful gambling debts, and the collection of various usurious loans. Pet. App. A13. Scarfo participated in every phase of his family's operations. *Id.* at A13-A21. Each petitioner participated in murders and attempted murders. *Id.* at A13. In addition, Ciancaglini participated in extortion and drug trafficking. *Id.* at A20.

2. Prior to this case, petitioner Scarfo was convicted in the Eastern District of Pennsylvania of conspiring to extort and extorting $1 million from real estate developer Rouse & Associates in exchange for the cooperation of Philadelphia Councilman Leland Beloff in securing the passage of a zoning ordinance that Rouse needed to complete a redevelopment project on the Philadelphia waterfront. In a separate trial in the Eastern District of Pennsylvania, Scarfo was acquitted of conducting a continuing criminal enterprise. Pet. App. A32. In addition, in 1980 Scarfo was acquitted in New Jersey state court of the murder of Vincent Falcone, and in 1988 he was acquitted in Pennsylvania state court of the murder of Salvatore Testa. *Id.* at A27.

The Rouse extortion and the Falcone and Testa murders were each charged as predicate acts of racketeering in the RICO counts here. In addition, one of the predicate offenses in the CCE indictment was a conspiracy charge alleging as an overt act the attempted murder of Steven Vento, which was also charged as a racketeering act in the RICO counts here. See Pet. App. A32 n.21. By special verdict, the jury found that Scarfo had committed those and 28 additional predicate acts of racketeering. *Id.* at A33-A34.

On appeal, Scarfo contended that his successive prosecutions for the predicate acts of racketeering

and for the RICO offenses violated the Double Jeopardy Clause. The court of appeals rejected that claim. Pet. App. A32-A42. First, the court held that Scarfo's double jeopardy claim "cannot possibly be accepted" in light of the fact that the jury, by special verdict, found that he had committed numerous predicate acts of racketeering other than those for which he previously had been tried. *Id.* at A33-A34.

Relying on its previous decision in *United States* v. *Grayson*, 795 F.2d 278 (3d Cir. 1986), cert. denied, 479 U.S. 1054 (1987), the court further held that, because RICO is intended to punish continuing criminal misconduct and the predicate offenses are intended to punish discrete criminal acts, RICO is not the same offense as the predicate acts for double jeopardy purposes, and therefore "the double jeopardy clause does not bar a subsequent RICO prosecution which is based, in part, on predicate offenses for which the defendant already has been prosecuted." Pet. App. A34-A35.

Finally, the court rejected Scarfo's reliance on this Court's decision in *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990). The court concluded that *Grady* "extends only to offenses arising from a single discrete event" and does not "foreclose[] successive prosecutions in cases of compound-complex felonies such as RICO, which involve several criminal acts occurring at different times in different places." Pet. App. A36. Rather, the court found the double jeopardy problem posed by this case to be closer to that in *Garrett* v. *United States*, 471 U.S. 773 (1985), which rejected a double jeopardy challenge to the government's use of an already adjudicated drug offense as a predicate offense in a later prosecution for engaging in a continuing criminal enterprise. Pet. App. A40.

3. Before the court of appeals, Ciancaglini renewed his contention, made initially in a pretrial interlocutory appeal, *United States* v. *Ciancaglini*, 858 F.2d 923 (3d Cir. 1988), that the RICO charges were barred by the Double Jeopardy Clause because of his earlier prosecution for a RICO conspiracy involving the same enterprise. The court of appeals reaffirmed its previous holding that the two RICO prosecutions involved different offenses. Pet. App. A45-A51.

Scarfo and the Narduccis argued that their consecutive sentences for RICO conspiracy and the substantive RICO charge violated the Double Jeopardy Clause. Relying on its previous decision in *United States* v. *Marrone*, 746 F.2d 957 (3d Cir. 1984), the court held that Section 1962(c) and (d) define separate offenses and therefore do not merge for purposes of sentencing. Pet. App. A52-A57. The court also rejected the Narduccis' contention that their sentences on the RICO counts could not properly be ordered to run consecutively to the sentences of life imprisonment they received in Pennsylvania state court for the murder of Frank D'Alfonso. *Id.* at A57-A64.

Petitioner Ciancaglini further argued that the prosecutor impermissibly vouched in his rebuttal summation for the credibility of government witnesses Thomas DelGiorno and Nicholas Caramandi. The court of appeals agreed that the prosecutor inappropriately invoked his oath of office in an attempt to defend the credibility of his witnesses. Pet. App. A76. Nevertheless, the court held that the prosecution's argument did not constitute plain error because it did no more than refute improper suggestions in defense closing argument that the prosecutors and

agents had engaged in fabrication of testimony and other serious misconduct. *Id.* at A77-A80.

Next, the court of appeals rejected petitioner Virgilio's contention that the evidence was insufficient to support his participation in two of the three acts of racketeering on which the jury relied in convicting him on the RICO counts—the extortion of John Hartung and the extortion of Jerome Slobotkin. The court found that the evidence supported "a reasonable inference that Virgilio personally furthered the shakedown operation by performing acts entitling him to remuneration from the shakedown proceeds and by discussing with his co-conspirators the FBI's intrusion into the operation." Pet. App. A94-A95.

The Narduccis also argued that the RICO counts were fatally defective because Section 1961(1)(A), which defines racketeering activity, does not specifically mention attempted murder or conspiracy to murder, which were charged against them as predicate acts of racketeering, and because an inchoate crime such as conspiracy may not serve as a predicate act for a RICO conspiracy. The court held that attempted murder and conspiracy to murder are "act[s] or threat[s] involving murder" within the meaning of Section 1961(1)(A). Pet. App. A99. The court further held that "[a]s a RICO conspiracy and its underlying conspiracy offenses arise from different agreements, and section 1961(1)(A) authorizes the charging of predicate conspiracies, the inclusion in the indictment of predicate conspiracies to commit murder did not constitute error." *Id.* at A100.

The Narduccis finally claimed that the indictment was duplicitous because it charged attempted murder, conspiracy to murder, and murder as alternative

theories within individual predicate acts. The court of appeals acknowledged that, if the jury had returned only a general verdict, it would be difficult to determine on which offense within a predicate act the jury had relied and whether the jury had reached unanimous agreement on any one offense. Pet. App. A102. But the court concluded that this concern was "entirely hypothetical," because the jury returned special interrogatories indicating the theory of murder on which it relied for each predicate act. *Id.* at A102-A103.

ARGUMENT

1. Petitioner Scarfo renews his contention (Pet. 9-14) that his successive prosecutions violated the Double Jeopardy Clause. The court of appeals correctly rejected that claim.

a. In the first place, even if the Double Jeopardy Clause barred the use of the previously adjudicated charges against Scarfo as predicate acts of racketeering in the RICO counts, Scarfo would not be entitled to reversal. By special verdict, the jury found that Scarfo committed 32 charged predicate acts of racketeering. Accordingly, even disregarding the four predicate acts that Scarfo claims could not be used, far more than enough would remain to support his RICO convictions.

b. In any event, the Double Jeopardy Clause does not bar the use of the previously adjudicated charges as predicate acts of racketeering. In *Garrett* v. *United States*, *supra*, this Court held that the Double Jeopardy Clause did not bar the use of a drug importation offense, for which the defendant had previously been convicted, as a predicate offense in a CCE prosecution. After determining that Congress intended to allow separate prosecutions for CCE and its predicate offenses, 471 U.S. at 779-786, the Court went on

to determine whether such separate prosecutions would nevertheless be unconstitutional. *Id.* at 786. The Court stated that the "critical inquiry is whether a CCE offense is considered the 'same offense' as one or more of its predicate offenses within the meaning of the Double Jeopardy Clause." *Ibid.*

The Court expressed "serious doubts" that the predicate drug violations were lesser included offenses within CCE, 471 U.S. at 790, cautioning against the "ready transposition of the 'lesser included offense' principles of double jeopardy from the classically simple situation [of a single course of conduct] to the multilayered conduct, both as to time and place, involved in this case." *Id.* at 789. Rather, the Court stated that "[q]uite obviously the CCE offense is not, in any common-sense or literal meaning of the term, the 'same' offense as one of the predicate offenses." *Id.* at 786. Nevertheless, assuming *arguendo* that CCE and its predicate offenses are the same offense, the Court concluded that the successive prosecutions did not violate the Double Jeopardy Clause because the CCE offense continued after the date of the indictment for the predicate offense. *Id.* at 791-793.

This case is controlled by *Garrett*. First, just as Congress intended to permit successive prosecutions for CCE and its predicate drug offenses, so it intended to permit successive prosecutions for RICO and its predicate acts of racketeering. Under RICO, the last alleged predicate act of racketeering must occur within ten years after the commission of the prior predicate act "excluding any period of imprisonment." 18 U.S.C. 1961(5). This language suggests that Congress envisioned the situation where a defendant is convicted and sentenced for a racketeering act and subsequently charged with a RICO viola-

tion based on the prior conviction. See *United States* v. *Grayson*, 795 F.2d 278, 282 (3d Cir. 1986), cert. denied, 479 U.S. 1054 (1987). Further, the legislative history shows that, in enacting RICO, Congress intended to establish "new penal prohibitions" and "enhanced sanctions." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (Statement of Findings and Purpose). Barring the use in RICO prosecutions of predicate acts for which the defendant previously had been convicted would nullify that intent. See *United States* v. *Rone*, 598 F.2d 564, 571 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

In addition, a RICO offense, like a CCE offense under *Garrett*, is not the "same offense" as any of its predicate acts. Like a CCE charge, a RICO charge requires proof of multiple criminal acts occurring over an extended period of time—10 years in this case—and an ongoing criminal association often involving a large group of individuals.[2]

Finally, Scarfo's successive federal prosecutions were permissible under *Garrett* because the RICO

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[2] Not surprisingly in light of *Garrett*, the courts of appeals have uniformly held that the Double Jeopardy Clause does not bar the use of an offense for which the defendant has already been prosecuted as a predicate act of racketeering in a RICO case. *E.g.*, *United States* v. *Gonzalez*, 921 F.2d 1530 (11th Cir. 1991); *United States* v. *Gambino*, 920 F.2d at 1108 (2d Cir. 1990); *United States* v. *Grayson*, 795 F.2d at 282-283; *United States* v. *Schell*, 775 F.2d 559, 568 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); *United States* v. *Persico*, 774 F.2d 30, 32 (2d Cir. 1985); *United States* v. *Watchmaker*, 761 F.2d 1459, 1466-1468 (11th Cir. 1985); *United States* v. *Licavoli*, 725 F.2d 1040, 1049-1050 (6th Cir.), cert. denied, 467 U.S. 1252 (1984); *United States* v. *Brooklier*, 637 F.2d 620, 621-624 (9th Cir. 1981), cert. denied, 459 U.S. 1206 (1983).

enterprise continued to October 1987, past the date of Scarfo's indictment for the Rouse extortion (January 5, 1987) and of the CCE indictment (September 6, 1987). See Pet. App. A42.[3]

c. Scarfo's reliance on *Grady* v. *Corbin*, *supra*, is unavailing. In *Grady*, this Court held that a prosecution for homicide and assault charges arising out of a fatal automobile collision was barred because the defendant had previously pleaded guilty to two misdemeanor traffic violations arising from the same incident—driving while intoxicated and failing to keep to the right of the median. Following the indictment, the State filed a bill of particulars that identified three reckless or negligent acts on which it would rely in proving its case: operating a motor vehicle while intoxicated, failing to keep to the right of the median, and driving at a speed too fast for the weather and road conditions. The Court held that, insofar as the State relied on conduct that constituted the previously prosecuted offenses to establish the essential element of recklessness or extreme negligence, the prosecutions for homicide and assault were barred. 110 S. Ct. at 2093.

Grady is not applicable here. That case involved a short-lived single course of criminal conduct rather than a compound-complex offense, such as RICO, spanning a considerable time period and embracing multiple criminal activities. As the Court stated in

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[3] Even putting *Garrett* aside, the state prosecutions for the murders of Falcone and Testa did not prevent those crimes from being charged as predicate acts of racketeering. Under the dual sovereignty doctrine, successive federal and state prosecutions for the same offenses arising out of the same acts are not barred by the Double Jeopardy Clause. See *United States* v. *Wheeler*, 435 U.S. 313 (1978).

Garrett, such a compound-complex offense does not "lend itself to the simple analogy of a single course of conduct." 471 U.S. at 788. And even in the context of simple offenses, the Court in *Grady* recognized that an exception to its rule against successive prosecutions for the same conduct may exist where, as here, the more serious crime is still ongoing at the time of the indictment for the less serious one. 110 S. Ct. at 2090 n.7.

The Court in *Grady* did not in any way repudiate or limit *Garrett*'s holding permitting successive prosecutions for predicate drug offenses and CCE. To the contrary, the Court cited *Garrett* with apparent approval. 110 S. Ct. at 2090-2091, 2094 n.15. As the court below concluded, Pet. App. A42, "[h]owever significant *Grady* v. *Corbin* may prove to be in cases of simple felonies, * * * it has nothing whatsoever to do with the compound-complex crimes at issue here." The other courts of appeals to address the impact of *Grady* in the RICO context have reached similar conclusions. *United States* v. *Gonzalez*, 921 F.2d 1530, 1535-1539 (11th Cir. 1991); *United States* v. *Link*, 921 F.2d 1523 (11th Cir. 1991); *United States* v. *Gambino*, 920 F.2d 1108, 1112-1113 (2d Cir. 1990); *United States* v. *Scarpa*, 913 F.2d 993, 1013-1014 n.8 (2d Cir. 1990); *United States* v. *Esposito*, 912 F.2d 60 (3d Cir. 1990).[4] But see *United*

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[4] None of the successive prosecution claims raised in this case should be held pending this Court's disposition of the petition for a writ of certiorari that we will soon be filing in *United States* v. *Felix*, No. 89-7058 (10th Cir. Feb. 28, 1991). Petitioners' claims concern the permissibility of prosecution of RICO charges after previous prosecutions for various RICO and other crimes; the courts of appeals that have addressed those issues since *Grady* have uniformly agreed with the Third

States v. *Russo*, 906 F.2d 77 (2d Cir. 1990) (per curiam) (accepting government's concession that *Grady* barred a prosecution for conduct that was charged as predicate acts in a prior RICO prosecution).[5]

2. Petitioner Ciancaglini was previously convicted of RICO conspiracy on an indictment returned in the Eastern District of Pennsylvania on February 19, 1981. He contends (Pet. 16-29) that, in light of his earlier RICO prosecution, the present RICO conspiracy charges are barred by the Double Jeopardy Clause. The courts below correctly rejected that claim.

Circuit here in rejecting the defendants' claims. *Felix* does not involve RICO charges, but instead concerns the permissibility of prosecution for narcotics conspiracy and substantive narcotics charges after a prior prosecution for attempt to manufacture narcotics in which evidence of the narcotics conspiracy and the substantive narcotics charges was introduced. The issues in *Felix* concern (1) whether the conduct at issue in a conspiracy case is the conspiratorial agreement or the conduct from which the government asks the jury to infer the conspiratorial agreement, and (2) whether the introduction of prior similar act evidence under Fed. R. Evid. 404(b) precludes later prosecution for the prior similar acts themselves.

[5] Contrary to petitioner's argument (Pet. 14), *United States* v. *Calderone*, 917 F.2d 717 (2d Cir. 1990), petition for cert. pending, No. 90-1527, does not support his invocation of *Grady*. In *Calderone*, a divided panel of the Second Circuit held that, under *Grady*, the defendants' acquittal on charges of participating in a wide-ranging, multi-drug conspiracy barred a subsequent prosecution alleging a narrower, single-drug conspiracy. However, the same court has held that *Grady* does not bar using previously prosecuted offenses as predicate acts in a RICO prosecution. *United States* v. *Gambino*, *supra*; *Scarpa*, 913 F.2d at 1013-1014 n.8.

a. In determining whether successive RICO prosecutions are permissible under the Double Jeopardy Clause, courts employ a totality of the circumstances analysis, considering such factors as "(1) whether the activities that * * * constituted two different RICO pattern[s] occurred during the same time periods; (2) whether the activities occurred in the same places; (3) whether the activities involved the same persons; (4) whether the two indictments alleged violations of the same criminal statutes; and (5) whether the overall nature and scope of the activities set out in the two indictments were the same." *United States* v. *Ruggiero*, 754 F.2d 927, 932 (11th Cir.), cert. denied, 471 U.S. 1127 (1985). See also *United States* v. *Langella*, 804 F.2d 185, 189 (2d Cir. 1986); *United States* v. *Russotti*, 717 F.2d 27, 33 (2d Cir. 1983), cert. denied, 465 U.S. 1022 (1984); *United States* v. *Dean*, 647 F.2d 779, modified en banc on other grounds (8th Cir. 1981), 667 F.2d 729, cert. denied, 456 U.S. 1006 (1982).

Ciancaglini takes issue with the analysis employed in the cases cited above, arguing that, as applied in the RICO conspiracy context, it improperly focuses on the pattern element of a RICO conspiracy rather than on the scope of the conspiratorial agreements. This argument overlooks the fact that, in order to determine whether successive RICO conspiracy prosecutions involve the same conspiratorial agreement, it is necessary to focus on the pattern and enterprise elements, since the objective of a RICO conspiracy is to commit racketeering acts in furtherance of an enterprise. Courts are not able to determine whether two conspiracy cases charge the same agreement in a vacuum; they can do so only by reference to the objectives that the parties sought to achieve and the

activities in which they engaged in order to achieve them. Thus, the factors listed above are essentially the same factors that courts traditionally have used in non-RICO cases for the purpose of determining whether multiple conspiracy indictments charge the existence of a single conspiratorial agreement.[6]

Applying the totality of the circumstances test here, the court of appeals correctly concluded that the successive RICO prosecutions did not violate the Double Jeopardy Clause. To be sure, the two indictments involved essentially the same enterprise and events that took place in the same general location. But although the two conspiracy charges covered a total of more than 15 years, they overlapped for only 25 months, and during that time only one of 36 racketeering acts and five of 123 overt acts were committed. Significantly, the racketeering acts and overt acts charged against Ciancaglini in the two indictments were completely different, and all of the racketeering acts and overt acts charged against him in the second indictment postdated the first indictment. Moreover, although both indictments charged racketeering acts

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[6] These factors include: (1) the time periods during which the events alleged to be part of the conspiracies occurred; (2) the places where the events occurred; (3) the persons acting as co-conspirators; (4) the statutory offenses charged in the indictments; and (5) the overt acts or any other description of the offense charged that indicates the nature and scope of the activity that the government sought to punish in each case. See *United States* v. *Marable*, 578 F.2d 151, 154 (5th Cir. 1978). Accord *United States* v. *Liotard*, 817 F.2d 1074, 1077-1078 (3d Cir. 1987); *Arnold* v. *United States*, 336 F.2d 347, 350 (9th Cir. 1964), cert. denied, 380 U.S. 982 (1965); *Short* v. *United States*, 91 F.2d 614, 619-620 (4th Cir. 1937). Cf. *United States* v. *Broce*, 109 S. Ct. 757, 770 n.2 (1989) (Blackmun, J., dissenting).

involving extortion and gambling, the focus of the later indictment was murder, attempted murder, and drug distribution, crimes that played no role in the first indictment. Finally, while a few individuals charged in each indictment were named as unindicted co-conspirators in the other, Ciancaglini is the only individual among a total of 28 defendants who was charged in both indictments. As the court of appeals concluded when it first considered Ciancaglini's double jeopardy claim on his pretrial appeal, "[u]nder the totality of the circumstances test, * * * Ciancaglini has not been subjected twice to jeopardy by including him as a defendant in both [RICO] indictments." *United States* v. *Ciancaglini*, 858 F.2d 923, 930 (3d Cir. 1988).

b. There is an independent basis for upholding the successive RICO prosecutions against Ciancaglini. As noted above, this Court held in *Garrett* v. *United States*, 471 U.S. 773, 791-792 (1985), that a defendant may be successively prosecuted where the second-charged offense was not committed until after the earlier indictment, because the earlier indictment could not have put him in jeopardy for that offense. Because all the predicate acts of racketeering and overt acts charged against Ciancaglini postdated the initial RICO indictment, the second prosecution was not barred by the Double Jeopardy Clause. A contrary holding would provide a lifetime grant of immunity from RICO prosecution for any member of a criminal enterprise who has once been prosecuted for a RICO offense, even if he continues to commit acts of racketeering on behalf of the enterprise.[7]

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[7] Ciancaglini's reliance on *Grady* v. *Corbin* is misplaced, for the same reasons as was Scarfo's reliance on the same case. See *supra*, pp. 11-13.

3. The Narduccis contend (Pet. 12-18, 26-29) that the RICO counts against them impermissibly charged predicate offenses involving conspiracy to commit murder and attempt to commit murder. Specifically, they argue that 18 U.S.C. 1961(1)(A) does not mention attempted murder and conspiracy to murder in enumerating the state offenses that qualify as racketeering activities; that neither Pennsylvania nor New Jersey law contains separate offenses entitled "conspiracy to commit murder" or "attempt to commit murder"; and that a conspiracy may not serve as a predicate act of racketeering in a RICO conspiracy count because it is impermissible to charge a conspiracy to conspire.

a. Attempt and conspiracy to commit murder qualify as predicate acts of racketeering under Section 1961(1)(A). That provision defines racketeering activity to include "any act or threat involving murder." As the court of appeals explained, that language is "broad enough" to encompass conspiracies and attempts. Pet. App. A98-A99. This is especially so in view of Congress's expressed intention that the RICO statute "be liberally construed to effectuate its remedial purpose." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (codified at 18 U.S.C. 1961 note). Every court of appeals to address the issue has agreed that conspiracies and attempts to violate the state offenses enumerated in Section 1961(1)(A) qualify as predicate acts. *United States* v. *Echeverri*, 854 F.2d 638, 648-649 (3d Cir. 1988); *United States* v. *Angiulo*, 847 F.2d 956, 963 n.8 (1st Cir.), cert. denied, 488 U.S. 852 (1988); *United States* v. *Benevento*, 836 F.2d 60, 72 (2d Cir. 1987), cert. denied, 486 U.S. 1043 (1988); *United States* v. *Manzella*, 782 F.2d 533, 537-538 (5th Cir.), cert.

denied, 476 U.S. 1123 (1986); *United States* v. *Licavoli*, 725 F.2d 1040, 1044-1046 (6th Cir.), cert. denied, 467 U.S. 1252 (1984); *United States* v. *Brooklier*, 685 F.2d 1208, 1216 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983).[8]

b. Nor is there any merit to the Narduccis' claim based on state law. It is true that neither Pennsylvania nor New Jersey has separate statutes entitled "conspiracy to commit murder" or "attempt to commit murder." As the Narduccis acknowledge (Pet. 15, 17), however, both states have separate general statutes making it a crime to conspire or attempt to commit any substantive crime. Accordingly, conspiracy and attempt to commit murder are "chargeable under State law" within the meaning of Section 1961(1)(A), and there was no error in alleging them as predicate racketeering acts.[9]

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[8] The Narduccis' reliance on *United States* v. *Ruggiero*, 726 F.2d 913 (2d Cir.), cert. denied, 469 U.S. 831 (1984), is misplaced. The court in that case specifically held that conspiracy to murder "is an 'act involving' murder and therefore may constitute 'racketeering activity' within the meaning of the RICO statute." 726 F.2d at 919. To be sure, the court also held that a conspiracy to violate the federal gambling statute, 18 U.S.C. 1955, could not be a predicate act under Section 1961(1)(B). However, unlike Section 1961(1)(A), Section 1961(1)(B) requires that the offensive conduct be an "act which is indictable under" one of several specifically enumerated statutes. Because Section 1955, one of the listed statutes, proscribes the substantive offense of conducting an illegal gambling business, but not a conspiracy to conduct one, the court concluded that the latter does not qualify as a racketeering activity. 726 F.2d at 920.

[9] Relying on the overt act requirement in the Pennsylvania and New Jersey conspiracy statutes, the Narduccis complain that their indictment is defective because it omitted to charge any overt acts in furtherance of their murder conspiracies. In

c. Finally, there is no bar to charging a conspiracy as a predicate offense in a RICO conspiracy count. As we have shown, under Section 1961(1)(A) a conspiracy may serve as a predicate act of racketeering. Since the definition of racketeering activity in Section 1961 applies to RICO conspiracies as well as to the substantive RICO offense, the use of a conspiracy as a predicate offense in a RICO conspiracy charge is statutorily authorized.

The Narduccis' argument that a RICO conspiracy based on predicate conspiracy offenses is a conspiracy to conspire misunderstands the nature of a RICO conspiracy. As the court of appeals explained, "the RICO conspiracy and the predicate conspiracy are distinct offenses with entirely different objectives." Pet. App. A100. The objective of a RICO conspiracy is to participate in an enterprise through the commission of criminal acts, including conspiracies. In contrast, the objective of the predicate conspiracy is to commit a particular act of racketeering. As the court of appeals explained in *United States* v. *Ruggiero*, 726 F.2d at 923, "[a] RICO conspiracy under § 1962(d) based on separate conspiracies as predicate offenses is not merely a 'conspiracy to conspire' * * *, but is an overall conspiracy to violate a substantive portion of RICO." Accord *Brooklier*, 685 F.2d at 1216.

4. The Narduccis contend (Pet. 18-26) that the indictment was duplicitous in that it charged them with conspiracy to murder, attempted murder, and murder as alternative theories within individual

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fact, however, the indictment did allege that the Narduccis committed overt acts, and the district court expressly instructed the jury that an overt act in furtherance of the murder conspiracies was required. Pet. App. A99 n.73.

predicate acts. They argue that they were prejudiced because of the resulting uncertainty about which offense within the predicate acts at issue the jury relied on and about whether the jury verdict with respect to those predicate acts was unanimous.[10]

As an initial matter, the Narduccis neglected to raise this argument prior to trial. Accordingly, they waived it. See Fed. R. Crim. P. 12(b)(2) and (f).

In any event, while not going so far as to find the indictment duplicitous, the court of appeals agreed with the Narduccis that "the dangers associated with duplicitous pleading were * * * present in this case." Pet. App. A102. The court noted, however, that these concerns were rendered "entirely hypothetical because the jury returned special interrogatories which indicated the theory of murder upon which the jury relied." *Ibid.* By completely obviating the dangers about which the Narduccis complain, the use of special interrogatories rendered any error in the form of pleading used in the indictment harmless.[11]

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[10] The Narduccis also complain that as a result of the allegedly duplicitous indictment, evidence was admitted that might not have been admitted if only a single offense were charged in the affected predicate acts. The Narduccis, however, do not indicate to what evidence they are referring. Any evidence admitted to prove conspiracy to murder that would not have been admissible to prove the actual murder would certainly have been admissible to prove the overall RICO conspiracy.

[11] The Narduccis argue that the use of special interrogatories was improper, and that the district court gave a confusing supplemental instruction, reproduced at pages 23 to 25 of their petition, explaining the difference between RICO conspiracy and conspiracy as a predicate act. First, by failing to object either to the use of special interrogatories or to the supplemental instruction, the Narduccis waived their claims. Sec-

5. Virgilio contends that the evidence was insufficient to support his RICO convictions. In particular, he argues that the evidence failed to establish his participation in two of the three predicate acts of racketeering with which he was charged—the extortion of John Hartong and the extortion of Jerome Slobotkin.

The evidence showed that the Scarfo organization extorted money from Hartung and Slobotkin over a prolonged period of time as part of its massive shakedown operation of minor criminals, Pet. App. A87; that Virgilio was regularly paid a portion of the organization's shakedown proceeds in return for doing "jobs" and "errands" for Scarfo, *id.* at A88; that Virgilio was closely associated with Philip Leonetti, who supervised a shakedown crew, *id.* at A93; and that Virgilio attended a meeting with Leonetti and Scarfo at which they discussed the implications of the FBI's recent confiscation of shakedown proceeds from the house of co-defendant Salvatore Scafidi, *ibid.*

That evidence was sufficient to show that Virgilio had knowledge of the source of his income and that the "jobs" and "errands" he did for Scarfo related to the shakedowns. As the court of appeals found, "the jury was entitled to infer that the errands related in some fashion to the shakedowns, especially

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ond, the courts have approved the use of special interrogatories in complex RICO cases involving multiple defendants and numerous alleged predicate acts. *Ruggiero*, 726 F.2d at 922-923; *United States* v. *Palmeri*, 630 F.2d 192, 202-203 (3d Cir. 1980), cert. denied, 450 U.S. 967 (1981). Finally, the court's supplemental instruction correctly explained that the conspiracy charged in Count 1 was a conspiracy to participate in an enterprise through a pattern of racketeering activity, while the conspiracies charged in the predicate acts were agreements to commit particular substantive offenses.

considering [Virgilio's] close association with Leonetti * * * [and] his attendance of a meeting convened to address the threat to the shakedowns posed by the FBI." Pet. App. A94. In short, the evidence that Virgilio participated in the shakedown operation by performing acts entitling him to remuneration from the shakedown proceeds and by discussing with his co-conspirators the FBI's intrusion into the operation was sufficient to show that he agreed to and aided and abetted the shakedowns of Hartung and Slobotkin.[12] The court of appeals' factual determination that the evidence was sufficient to support Virgilio's RICO convictions was therefore correct and does not warrant the Court's review.[13]

6. One of the predicate acts of racketeering charged in the RICO counts against the Narduccis was the murder of Frank D'Alfonso. Before trial, the government successfully moved to strike the D'Alfonso murder from the indictment so that the Narduccis could be tried by the State, which already

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[12] Although the government must show that the defendant personally committed at least two predicate racketeering acts in order to prove a substantive RICO offense, it may do so on an aiding and abetting theory. See *United States* v. *Rastelli*, 870 F.2d 822, 832 (2d Cir.), cert. denied, 110 S. Ct. 515 (1989); *United States* v. *Qaoud*, 777 F.2d 1105, 1117-1118 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986).

[13] Virgilio's reliance on *United States* v. *Kragness*, 830 F.2d 842 (8th Cir. 1987), is misplaced. There, the court of appeals reversed a RICO conspiracy conviction because the defendant had no knowledge of two of the three predicate acts with which he had been charged. As the court below explained, however, the circumstances in *Kragness* were "quite different" from those here; in that case, "the defendant's claim that he had no knowledge of two [predicate acts] was credible." Pet. App. A89.

had indicted them, at the conclusion of the federal case.[14] After the jury's verdict in this case, but before sentencing, the Narduccis were convicted by the State of first-degree murder and given life sentences. At the sentencing conference, the district court granted the government's motion to amend the presentence report to reflect the state convictions and sentences. Then, at sentencing, the court ordered the Narduccis' federal sentences on the RICO charges to run consecutively to the life sentences imposed by the state court. The Narduccis contend (Pet. 36-43) that this was error.

a. First, the Narduccis contend that district courts lack authority to order that federal sentences run consecutively to state sentences, because such an order would encroach on the Attorney General's sole authority, under 18 U.S.C. 4082(a) (1982) (repealed), to designate the place of confinement.[15] That contention is incorrect. Under 18 U.S.C. 3568, a sentence of imprisonment does not commence until the defendant "is received at the penitentiary, reformatory, or

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[14] Under Pennsylvania law, a state prosecution of the Narduccis for the D'Alfonso murder would have been barred by a previous federal prosecution on that charge. 18 Pa. Cons. Stat. Ann. § 111 (Purdon 1983).

[15] Section 4082(a) still applies with respect to offenses, like the Narduccis', that were committed before November 1, 1987. It provides that "[a] person convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served." With respect to offenses committed on or after November 1, 1987, district courts are authorized to specify that a federal sentence be served concurrently or consecutively to a prior state sentence. 18 U.S.C. 3584.

jail for service of such sentence." Accordingly, where a federal sentence is to run consecutively to a prior state sentence, the Attorney General is not called upon to exercise his authority to designate the place of confinement until the state sentence is completed and the defendant is delivered into federal custody. The court of appeals therefore correctly held that the district court's imposition of a consecutive federal sentence "in no way encroach[ed] upon the authority of the Attorney General under section 4082(a) to 'designate the place of confinement.'" Pet. App. A61. Other courts of appeals have reached the same conclusion. *Salley* v. *United States*, 786 F.2d 546, 547 (2d Cir. 1986); *United States* v. *Campisi*, 622 F.2d 697, 699 (3d Cir. 1980); *United States* v. *Lee*, 500 F.2d 586 (8th Cir.), cert. denied, 419 U.S. 1003 (1974); *Anderson* v. *United States*, 405 F.2d 492 (10th Cir.), cert. denied, 394 U.S. 965 (1969).

The Narduccis rely on *United States* v. *Terrovona*, 785 F.2d 767 (9th Cir.), cert. denied, 476 U.S. 1186 (1986). In that case, the court of appeals held that, with respect to crimes committed before November 1, 1987, district courts lack authority to do more than recommend to the Bureau of Prisons that a federal sentence run concurrently with or consecutively to a prior state sentence. 785 F.2d at 770. However, another panel of the Ninth Circuit has held that district courts may order that the sentences run consecutively. *United Staies* v. *Thornton*, 710 F.2d 513, 516 (9th Cir. 1983). Yet another panel, in *United States* v. *Williams*, 651 F.2d 644, 647 n.2 (9th Cir. 1981), simply noted that a district court's recommendation that a sentence run concurrently or consecutively to a state sentence will as a matter of practice automatically be followed by the Bureau of

Prisons, and for purposes of that case treated the recommendation as a determination of sentence. See *Terrovona*, 910 F.2d at 1118. In light of *Williams* and *Thornton*, it is not clear that *Terrovona* reflects the law of the Ninth Circuit. Moreover, even if the circuits can be said to be in conflict on that issue, the conflict affects only cases arising from crimes committed prior to November 1, 1987. It therefore presents an issue of diminishing importance that does not warrant further review by this Court.[16]

b. The Narduccis also argue that consecutive federal sentences were precluded because postsentence motions were still pending in the state court at the time of the federal sentencing. They rely on Rule 359 of the Pennsylvania Rules of Criminal Procedure, which provides that in cases where the death penalty or a mandatory sentence is authorized by law, the court may immediately impose the sentence but that the sentence becomes final "for the purpose of appeal" only after all postsentence motions are decided. The court of appeals correctly concluded that "the existence of pending postsentence motions in state court

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[16] Nor are the Narduccis helped by the Third Circuit's earlier decision in *Gomori* v. *Arnold*, 533 F.2d 871, cert. denied, 429 U.S. 851 (1976), holding that district courts lack authority to direct that a federal sentence run *concurrently* with a prior state sentence. In so holding, the *Gomori* court relied on the fact that under Section 3568 a federal sentence does not commence until the defendant is received at the penitentiary. 533 F.2d at 875. However Section 3568 is construed with respect to a court's power to impose concurrent sentences, it does not affect the power to impose a consecutive federal sentence that by necessity would not commence until the defendant is in federal custody. Accordingly, there is no inconsistency between the Third Circuit's decision here and its decision in *Gomori*.

[does not] mean that the state sentences are not final for purposes of federal sentencing." Pet. App. A62. As the court explained, the purpose of the state rule is to prevent appeals within the state system during the pendency of postsentence motions because the resolution of such motions could have a significant impact on the appeal. *Ibid.* Accordingly, since "the imposition of a consecutive federal sentence in no way affects the state appellate process, [there is no reason] why Rule 359 should preclude consecutive federal sentencing." *Id.* at A63.[17]

c. Finally, the Narduccis argue that their consecutive federal sentences are inconsistent with the Justice Department's *Petite* policy against successive federal and state prosecutions for the same offense. See *Petite* v. *United States*, 361 U.S. 529 (1960). Under the *Petite* policy, federal prosecutors considering a federal prosecution for an offense for which the defendant already has been prosecuted by the State must obtain prior authorization from a Justice Department official, who must decide whether there are "compelling reasons" for pursuing the matter. *Rinaldi* v. *United States*, 434 U.S. 22, 28-29 (1977) (per curiam).

This claim is insubstantial. First, the *Petite* policy is an internal Justice Department rule that does not confer any substantive rights on defendants. See

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[17] Nor is there any merit to the Narduccis' claim that the consecutive federal sentence was improper because they had not yet exhausted the appellate process. The only authorities they cite for this novel proposition are decisions that address the retroactive application of statutes enacted and cases decided during the pendency of appeals in criminal cases. *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Commonwealth* v. *Thomas*, 450 Pa. 548, 301 A.2d 359 (1973); *Commonwealth* v. *Little*, 432 Pa. 256, 248 A.2d 32 (1968).

United States v. *Manbeck*, 744 F.2d 360, 371 n.7 (4th Cir. 1984), cert. denied, 469 U.S. 1217 (1985); *United States* v. *Hadley*, 671 F.2d 1112, 1116 (8th Cir. 1982). Further, the Narduccis' state prosecution followed the federal prosecution, so the *Petite* policy has no relevance here. Last, double jeopardy considerations, which underlie the *Petite* policy, do not bar the use of an offense for which the defendant has already been prosecuted as a predicate act in a RICO case. See, *e.g.*, *United States* v. *Gonzalez*, 921 F.2d 1530 (11th Cir. 1991); *United States* v. *Gambino*, 920 F.2d 1108 (2d Cir. 1990); *United States* v. *Schell*, 775 F.2d 559, 568 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986).

6. All of the remaining contentions raised by petitioners were raised in currently pending petitions for a writ of certiorari previously filed by petitioners' co-defendants, and were addressed in our consolidated brief in opposition to those petitions.[18] See 90-6472 U.S. Br. in Opp. at 12-17 (addressing Ciancaglini's claim that the prosecutor improperly vouched for the credibility of key government witnesses); *id.* at 17-19 (addressing Ciancaglini's claim that the district court's instruction on co-conspirator liability improperly allowed the jury to convict on the RICO conspiracy charge without finding that the individual defendants had the requisite intent regarding the underlying predicate acts); *id.* at 19-25 (addressing petitioners' claim that the district court erred in sentencing petitioners to consecutive sentences for RICO conspiracy and the underlying substantive RICO offense). Peti-

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[18] The Narduccis state (90-7084 Pet. 43) that they join in all arguments presented by petitioners in any of the cases consolidated with theirs in the court of appeals.

tioners here make no new arguments in support of those claims. Accordingly, we rely here on our previous submission, a copy of which we are serving on counsel for petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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